

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP699-CR

Cir. Ct. No. 2015CF404

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRON A. HUDSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Derron Hudson challenges the scope and duration of a traffic stop that led to his conviction for possession of cocaine, second or subsequent offense. We affirm.

¶2 Appleton police officer Jeremy Haney stopped Hudson’s vehicle for an obstructed view violation under WIS. STAT. § 346.88(3)(b) (2015-16).¹ Before he stopped Hudson’s vehicle, Haney called for backup and officer Nathan Hoffman arrived as Haney was pulling over Hudson’s vehicle. Hoffman asked Hudson for his driver’s license and proof of insurance, but Hudson was on his cell phone and “wasn’t really talking to us, wasn’t going along with the traffic stop. ... [H]e was not really paying attention to us, not listening to what we were asking of him.” Hoffman had to ask Hudson several times to hang up his cell phone, and Hudson was slow in complying with Hoffman’s requests.

¶3 Eventually, Hudson complied with Hoffman’s requests, and Hoffman went back to his squad car to process Hudson’s information. By that point, a third officer from the Wisconsin State Patrol had arrived. That officer helped with moving the occupants out of Hudson’s vehicle for safety reasons so Haney could walk his drug-sniffing dog around the vehicle.² During the walk-

¹ The statute provides, in relevant part, that “No person shall drive any motor vehicle upon a highway with any object so placed or suspended in or upon the vehicle so as to obstruct the driver’s clear view through the front windshield.” WIS. STAT. § 346.88(3)(b) (2015-16). Hudson challenged the initial stop in the circuit court, but he does not renew this argument on appeal and has therefore abandoned the issue. See *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Haney was one of the Appleton police department’s K9 handlers on routine patrol when he pulled over Hudson. Haney’s drug-sniffing dog, Jico, was with him in the back of his squad car.

around of the exterior of the vehicle, the dog alerted on the driver's side, signifying an odor of a specific narcotic that the dog was trained to detect. Following that alert, Haney allowed the dog inside the vehicle and the dog alerted on the middle console area. A brief search revealed a white powdery substance later confirmed to be cocaine. A later more extensive search revealed empty plastic bags used to store or package controlled substances, including cocaine.

¶4 After Haney's K9 alerted on the vehicle, Haney placed the dog back inside his squad car. At the time, Hoffman was still inside his squad processing the traffic stop information. Haney's use of the dog did not interrupt Hoffman, nor did the state patrol officer interrupt Hoffman.

¶5 The circuit court denied Hudson's suppression motion. The court found there was "no delay" between when Haney stopped Hudson and when Hoffman arrived on the scene. The court also found any delay that occurred was caused by Hudson when Hudson was on his cellphone and uncooperative with the requests for information.³ Based upon the officers' testimony, the court also found "a traffic stop like the one conducted here normally takes about 15 minutes." The court noted that "within minutes of the traffic stop being started," Haney had already commenced the dog sniff. The court further found Hoffman had immediately begun checking the records after he returned to his squad car, and the dog sniff did not "prolong[] the stop beyond the normal time necessary to issue a warning for a view obstruction, and therefore, no additional reasonable suspicion

³ During the suppression hearing, a DVD containing multiple dash camera videos was offered and received into evidence, but the videos themselves were not played for the court. The parties agreed that the circuit court would watch them later before deciding the suppression motion.

was necessary for [Officer] Haney to conduct the dog sniff. The dog sniff in this case was valid.”

¶6 After the denial of the suppression motion, Hudson pleaded guilty to the cocaine possession charge. Hudson now appeals.

¶7 We review a circuit court’s denial of a motion to suppress in two steps. We examine the circuit court’s factual findings under a clearly erroneous standard. *State v. Vorburger*, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. We review independently the application of constitutional principles to those facts. *Id.* We specifically reject Hudson’s attempt to advance a “hybrid” standard of review. Hudson insists we should review the circuit court’s factual findings independently because those findings were not based on credibility determinations but upon videotape. However, a videotape was not the only evidence in the present case. We have held that when the only evidence on the question is the videotape itself, such as when the circuit court only has a child’s statement on videotape, appellate courts “are in as good a position” as the circuit courts to make factual determinations independently. *See, e.g., State v. Jimmie R.R.*, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (1999). But where, as here, the videotape is not the only evidence, and where the circuit court makes credibility and factual determinations based upon the testimony of multiple witnesses, we employ a clearly erroneous standard of review regarding factual findings. *See Vorburger*, 255 Wis. 2d 537, ¶32. The circuit court’s factual findings were based on the witnesses’ testimony, who “told a coherent and facially plausible story that [was] not contradicted by [the] extrinsic evidence” of the videos. *See Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985).

¶8 Here, the circuit court’s findings of fact are not clearly erroneous. Hudson’s contention that Haney improperly delayed his initial approach to await the arrival of Hoffman to facilitate a search for drugs has no basis in fact. The evidence presented at the suppression hearing supports the court’s finding that Haney did not delay the stop in any way to wait for Hoffman to arrive, as only one minute elapsed from the time Haney turned on his squad car lights to initiate the stop to when Hoffman approached and made contact with Hudson’s vehicle. The court also properly found that any subsequent delay was attributable to Hudson himself, not the officers.

¶9 Hudson’s contention that the dog sniff unlawfully prolonged or extended the initial stop also has no basis in fact. Specifically, Hudson insists the officers focused on the search for drugs, and that none of the officers were pursuing the view obstruction violation, abandoning that investigation altogether so that they could “search for drugs seemingly without cause.”

¶10 Again, the record belies Hudson’s assertion that no one was pursuing the traffic investigation. The K9’s walk-around the vehicle was completed within five minutes while Hoffman was still inside his vehicle processing Hudson’s records and completing the traffic investigation. None of the officers did anything to prolong the stop or the initial investigation so that Haney could perform the dog sniff. The circuit court’s findings are not clearly erroneous.

¶11 The officers’ investigation in this case was also well within the “mission” of a routine traffic stop. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1611 (2015). As part of their investigation, the officers here permissibly checked Hudson’s driver’s license, determined if outstanding warrants existed, and inspected the registration and proof of insurance, which were all permissible

actions as part of the initial traffic stop.⁴ The investigation was of acceptable duration and was limited to what was necessary to address the traffic violation that warranted the stop. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005). Walking the K9 around the vehicle did not add time to the initial investigation and was valid in any event because it was not a search. *Id.* at 410.

¶12 Once the K9 alerted to the presence of drugs, any extension of the initial stop was constitutionally justified by the additional reasonable suspicion that Hudson had committed a crime. *See, e.g., State v. Malone*, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. The subsequent search of the vehicle was also justified because a dog alert provides probable cause to search a vehicle. *See State v. Miller*, 2002 WI App 150, ¶¶11-15, 256 Wis. 2d 80, 647 N.W.2d 348.⁵

¶13 In short, the officers in the present case did not prolong the initial investigation in order to search for drugs. The dog sniff took place during the initial investigation into the traffic stop, while Hoffman was still running Hudson's information and processing the traffic violation. The circuit court properly denied the suppression motion.

⁴ Removing the occupants from Hudson's vehicle also did not prolong the stop in any way. For safety, an officer may order occupants outside of a vehicle incident to an otherwise valid stop for a traffic violation. *See State v. Johnson*, 2007 WI 32, ¶23, 299 Wis. 2d 675, 729 N.W.2d 182. Haney testified the occupants were asked to step outside the vehicle to protect the dog, the officers, and the vehicle's occupants. There was no indication of an improper purpose to the officers' actions.

⁵ Hudson does not challenge the vehicle search itself; he only argues the dog sniff improperly extended the traffic stop.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

